Supreme Court, U.S.
FILED
OCT 23 1980
MICHAEL RODAK, JR., CLERK

No. 80-380

In the Supreme Court of the United States

OCTOBER TERM, 1980

WOODROW JOHN GREGORY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

LOUIS M. FISCHER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-380

WOODROW JOHN GREGORY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTION PRESENTED

Whether the possibility that petitioners would invoke their Fifth Amendment privilege against self-incrimination in responding to a government action for forfeiture under 18 U.S.C. 1955 required that the action be dismissed without a trial.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Conclusion 8

TABLE OF AUTHORITIES

Cases:

Brotherhood of Locomotive Firemen & Enginemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327 4

Catlin v. *United States*, 324 U.S. 229 3

Cobbledick v. *United States*, 309 U.S. 323 4

Cogen v. *United States*, 278 U.S. 221 3

Grosso v. *United States*, 390 U.S. 62 ..... 2, 5

Hamilton-Brown Shoe Co. v. *Wolf Brothers & Co.*, 240 U.S. 251 4

Marchetti v. *United States*, 390 U.S. 39 ..... 2, 5

United States v. *Freed*, 401 U.S. 601 6

United States v. *Grezo*, 566 F. 2d 854 6

United States v. *MacDonald*, 435 U.S. 850 3

United States v. *Nolan*, 571 F. 2d 528 6

United States v. *One 1970 Pontiac GTO, 2-Door Hardtop*, 529 F. 2d 65 7

United States v. *Sahadi*, 555 F. 2d 23 6

Page

Cases—Continued:

United States v. *United States Coin & Currency*, 401 U.S. 715 ..... 2, 3, 4, 5, 6

United States v. *Ward*, No. 79-394 (June 27, 1980) 7

Constitution and statutes:

United States Constitution, Fifth Amendment 2, 3, 4, 5, 6, 7

Customs Act, 19 U.S.C. 1615 7

18 U.S.C. 1955 ..... 1, 5, 6

18 U.S.C. 1955(a) 6

18 U.S.C. 1955(b) 6

18 U.S.C. 1955(d) 2, 7

26 U.S.C. (1970 ed.) 4411 4

26 U.S.C. (1970 ed.) 4412 4

26 U.S.C. (1970 ed.) 4901 4

26 U.S.C. (1970 ed.) 7302 .....

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-16) is reported at 626 F. 2d 11. The opinion of the district court (C.A. App. A72-A75) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 1980. The petition for a writ of certiorari was filed on September 9, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On September 7, 1977, the government filed a forfeiture action in the United States District Court for the Middle District of Tennessee, alleging that money and other items seized from petitioners had been used in an illegal gambling business, in violation of 18 U.S.C. 1955. Petitioners thereafter filed claims to the property and moved to dismiss the complaint. The district court granted the motion to dismiss. On appeal by the government, the court of appeals reversed and remanded to the district court for further proceedings (Pet. App. A-1 to A-16).

The forfeiture action was based on the December 16, 1975, seizure of currency and gambling records from petitioners— $33,401 from Gregory, $45,706 from Banks, and $5,900 from Garmon (Pet. App. A-2). Although the circumstances of the seizure and the related investigation might have formed the basis for a criminal prosecution under Section 1955, no criminal charges were filed against petitioners. Instead, the instant forfeiture complaint was brought; it alleged that from October 1 until December 16, 1975, petitioners and others had conducted an illegal gambling business, in violation of 18 U.S.C. 1955 and state (Tennessee) law (*ibid.*). The complaint sought the

forfeiture of the currency and other items as contraband within the meaning of 18 U.S.C. 1955(d). Along with the complaint, the government served interrogatories requesting, *inter alia*, information regarding petitioners' participation in a gambling business (Pet. App. A-2).

Without answering the complaint, petitioners filed motions to dismiss on the ground that the entire forfeiture proceeding impermissibly burdened their privilege against self-incrimination. The district court agreed, citing *United States* v. *United States Coin & Currency*, 401 U.S. 715 (1971). The court stated that because the interrogatories sought potentially incriminating information, the forfeiture action could not be maintained (Pet. App. A-2 to A-3).

On the government's appeal, the court of appeals reversed. It concluded that the decision in *United States Coin & Currency* "neither controls this matter nor mandates the dismissal of the government's complaint" (Pet. App. A-4). The court pointed out that the federal wagering tax statutes underlying the forfeiture action in *United States Coin & Currency* punished the failure to file potentially incriminating tax forms and to pay incriminatory taxes, and that this Court had previously concluded that a criminal prosecution based on the failure to register or pay the gambling taxes impermissibly trenched upon the defendant's Fifth Amendment right against compulsory self-incrimination (Pet. App. A-4 to A-5, citing *Marchetti* v. *United States*, 390 U.S. 39 (1968), and *Grosso* v. *United States*, 390 U.S. 62 (1968)). In contrast, the court of appeals observed, "Section 1955 does not require that the gambler register or provide the government with any information whatsoever" and that therefore, "[u]nlike the statute involved in the *Marchetti—Coin & Currency* line, the structure of Section 1955, in and of itself, simply does not present a threat of self-incrimination" (Pet. App. A-5).

The court of appeals further concluded that although the forfeiture proceeding posed "genuine threats to [petitioners'] privilege against self-incrimination" (Pet. App. A-5), dismissal of the proceeding was not an appropriate remedy at this time (*id.* at A-9 to A-11). The court stated that rather than dismissing the case, the district court should attempt "to accommodate both the constitutional right against self-incrimination as well as the legislative intent behind the forfeiture provision" (*id.* at A-9). The court of appeals suggested, *inter alia*, that the government might be willing to immunize petitioners, that the district court could stay the forfeiture action until the relevant criminal statutes of limitation had run, or that petitioners might be able to prove their case through the testimony of others (*id.* at A-11 to A-14). Accordingly, the court of appeals remanded the case to the district court for further proceedings. Judge Merritt concurred in the reversal of the district court's order of dismissal, but noted his view that the forfeiture proceeding was criminal rather than civil in nature (*id.* at A-14 to A-16).

ARGUMENT

1. Relying on *United States* v. *United States Coin & Currency*, 401 U.S. 715 (1971), petitioners contend (Pet. 5-10) that the court of appeals erroneously reversed the district court's order dismissing this forfeiture proceeding on Fifth Amendment grounds. At the outset, however, we note that review by this Court is premature at this time. The ruling below places petitioners in the same position that they would have occupied had the district court denied their motion to dismiss in the first instance, and such an interlocutory order is not subject to pretrial appeal as of right. See *Catlin* v. *United States*, 324 U.S. 229 (1945); cf. *United States* v. *MacDonald*, 435 U.S. 850, 853-863 (1978); *Cogen* v. *United States*, 278 U.S. 221, 222-224 (1929). The same considerations that militate against interlocutory appeal of the denial of a motion to

dismiss also counsel against interlocutory review by this Court. If petitioners prevail at trial—a proceeding that has already been delayed three years—their claims will be moot. If, on the other hand, the government prevails in the forfeiture proceeding and the order of forfeiture is affirmed, petitioners will then be able to present all of their contentions to this Court by seeking review of the final judgment. In short, petitioners' claim "is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967); see *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 257-258 (1916); cf. *Cobbledick* v. *United States*, 309 U.S. 323, 324-326 (1940). This is particularly so in the present case, since it is not at all clear at this point what kind of accommodation will be struck to protect petitioners' rights against compelled self-incrimination.

2. In any event, the court of appeals correctly rejected petitioners' claims. Its decision does not conflict with any decision of this Court or of any court of appeals, and further review is unwarranted.

a. Citing *United States* v. *United States Coin & Currency*, *supra*, petitioners primarily contend that the forfeiture proceeding impermissibly burdens their Fifth Amendment rights, and that therefore the district court properly dismissed the complaint. In *Coin & Currency*, this Court held that the Fifth Amendment privilege against compulsory self-incrimination constituted a complete defense to the forfeiture action at issue in that case. The forfeiture proceeding was based on an alleged violation of the wagering tax provisions then in effect. See 26 U.S.C. (1970 ed.) 4411, 4412, 4901, 7302. Those statutes required gamblers to submit inculpatory information to the IRS regarding their gambling activities, which information was, in turn, given to various

prosecuting authorities. Because compliance with the reporting and taxing requirements therefore subjected a person to " 'real and appreciable,' and not merely 'imaginary and unsubstantial,' hazards of self-incrimination" (*Marchetti* v. *United States*, 390 U.S. 39, 48 (1968)), the Court had previously held that the Fifth Amendment privilege barred a criminal prosecution for failing to register and to pay the gambling tax. See *id.* at 42-57; *Grosso* v. *United States*, 390 U.S. 62 (1968). And in *Coin & Currency*, the Court extended its decisions in *Marchetti* and *Grosso* to permit the respondent in a forfeiture action arising under the same unconstitutional statutes to invoke his privilege against compulsory self-incrimination, because the forfeiture was based on his failure to report his participation in a criminal enterprise. See 401 U.S. at 717-722.

Thus, notwithstanding petitioners' characterizations of that decision (Pet. 5-7), *Coin & Currency* does not stand for the proposition that the Fifth Amendment privilege bars a forfeiture proceeding of any sort against a person alleged to be involved in a criminal enterprise. To the contrary, the Court carefully emphasized the narrow nature of its holding, noting that "[i]t was only the method [self-reporting] Congress had adopted in collecting the tax that raised the Fifth Amendment question" (401 U.S. at 717). Accordingly, the government remains free to collect taxes or to bring a forfeiture action "so long as it [does] not attempt to punish the taxpayer for his failure to file the required documents" (*id.* at 717-718). The court of appeals correctly applied these principles here.

Unlike the statutory scheme involved in *Marchetti*, *Grosso*, and *Coin & Currency*, 18 U.S.C. 1955 imposes no punishment for "failure to file the required forms" (401 U.S. at 717). Indeed, Section 1955 simply prohibits

substantial gambling businesses operating in violation of local law. See 18 U.S.C. 1955(a) and (b); *United States* v. *Grezo*, 566 F. 2d 854, 857-860 (2d Cir. 1977). Since nothing in the structure of Section 1955 requires or punishes the same kind of compulsory self-incrimination underlying the forfeiture in *Coin & Currency*, the court below correctly held that petitioners' Fifth Amendment privileges do not constitute a complete bar to the forfeiture action. See *United States* v. *Nolan*, 571 F. 2d 528, 530-531 (10th Cir. 1978). Cf. *United States* v. *Freed*, 401 U.S. 601, 605-606 (1971).[1]

b. Because of the unusual procedural setting of this forfeiture action—ordinarily, the forfeiture follows a criminal conviction under 18 U.S.C. 1955—[2] petitioners correctly point out that some of the interrogatories served by the government in this case pose substantial Fifth Amendment problems. Indeed, neither the government nor the court of appeals suggested otherwise. See Pet. App. A-5 to A-9. But the fact that petitioners may invoke their privilege against compulsory self-incrimination in this forfeiture proceeding does not justify dismissal of the case. Rather, as the court of appeals concluded, the district court should attempt to fashion a remedy that will both protect petitioners' privilege and permit the forfeiture action to go forward. See *United States* v. *Nolan*, *supra*, 571 F. 2d at 530-531. For example, petitioners may be granted use immunity with regard to any potential

---

[1]Likewise, the "1974 revisions of the federal wagering tax laws and the concomitant change in Treasury Department practices have eliminated the 'real and appreciable' hazards of self-incrimination that existed under the prior law." *United States* v. *Sahadi*, 555 F. 2d 23, 27 (2d Cir. 1977).

[2]We informed the court of appeals that the government had determined to file the forfeiture in lieu of prosecuting petitioners under 18 U.S.C. 1955.

criminal prosecutions or may obtain de facto immunity because the statutes of limitations have run. In any event, if the government prevails on remand and petitioners believe that their Fifth Amendment privileges were not fully protected, they may, of course, seek appellate review at that time.

c. Finally, petitioners cryptically contend (Pet. 7-8) that the "Court of Appeals erred in failing to specifically hold that the forfeiture proceeding is a criminal proceeding." Apparently, petitioners are suggesting that the forfeiture proceeding is criminal for all purposes and that therefore—quite apart from any problem of use against them in a separate criminal prosecution of evidence produced by them in the instant forfeiture proceeding—the statute is unconstitutional insofar as it relieves the government of its burden of proof beyond a reasonable doubt and imposes a burden of producing evidence on the claimants. But Section 1955(d) expressly incorporates the civil forfeiture provisions of the Customs Act (19 U.S.C. 1615), thus evidencing Congress' intent to render the forfeiture proceeding civil in nature. Cf. *United States* v. *Ward*, No. 79-394 (June 27, 1980), slip op. 5-7. Nor is there any question regarding Congress' power to impose a burden of production on a private claimant in the context of a civil or even quasi-criminal forfeiture proceeding. See, *e.g.*, *United States* v. *One 1970 Pontiac GTO, 2-Door Hardtop*, 529 F. 2d 65, 66 (9th Cir. 1976). In any event, this claim too is premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

LOUIS M. FISCHER
Attorney

OCTOBER 1980

DOJ-1980-10